Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

ELSA GOMEZ AND JOSE RAMIRO GOMEZ,
INDIVIDUALLY AND ON BEHALF OF JOSE GOMEZ
AND SERGIO GOMEZ, MINOR CHILDREN,
Petitioners,
v.
HOUSING AUTHORITY OF THE
CITY OF EL PASO, TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Texas state courts' decision to deny state court subject matter jurisdiction over Plaintiffs' pleaded claims arising under 42 U.S.C. § 1983 and the United States Constitution against the Defendant Housing Authority of the City of El Paso (HACEP), a non-state governmental entity that is a "person" not immune from liability or suit under federal law, is contrary to 42 U.S.C. § 1983 and federal common law, and contravenes the Supremacy Clause (Article 6, Clause 2) of the United States Constitution.

Whether the Texas state courts' apparent decision to construe a plea to the jurisdiction as the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim or other decision on the merits -- a procedural device not recognized or allowed in resolving a plea to the jurisdiction under Texas law -- constitutes a discriminatory application of a policy or rule contrary to 42 U.S.C. § 1983 and federal common law, and contravenes the Supremacy Clause (Article 6, Clause 2) and/or violates procedural due process and contravenes the Fifth Amendment of the United States Constitution, as applied to state action through the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW . . . i.

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Facts and Judicial Proceedings 3

B. Establishing This Court's Jurisdiction of the Questions Presented 5

REASONS FOR GRANTING THE PETITION . . . 6

CONCLUSION 10

Pages

APPENDIX (separate cover)

Appendix A
Judgment and Opinion of Eighth Court of Appeals (August 19, 2004) 1-16

Appendix B
Order of Eighth Court of Appeals denying Appellants' Motion for Rehearing (October 20, 2004) 17

Appendix C
Order of Supreme Court of Texas denying petition for review (April 8, 2005) ... 18

Appendix D
Order of trial court granting Plea to the Jurisdiction (February 20, 2003) 19

Appendix E
Excerpts of Reporter's Record Vol. 1 (Hearing on Motion for New Trial before the trial court on May 5, 2003) 20-27

Appendix F
Excerpts of Appellants' Brief to the Eighth Court of Appeals (October 20, 2003) . 28-37

Appendix G
Appellants' Motion for Rehearing to the Eighth Court of Appeals (September 23, 2004) 38-49

Appendix H
Excerpts of Petition for Review to the Supreme Court of Texas (January 14, 2005) .. 50-64

TABLE OF AUTHORITIES

Cases	Page
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	9
Gomez v. Housing Authority of the City of El Paso, Texas, 148 S.W.3d 471 (Tex. App.--El Paso 2004, pet. denied)	1,5,6
Howlett v. Rose, 496 U.S. 356 (1990)	6,7,8,9
Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982)	9
Matthews v. Eldridge, 424 U.S. 319 (1976)	9
Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978)	7
Owen v. City of Independence, Missouri, 445 U.S. 622 (1980)	6
St. Louis v. Praprotnik, 485 U.S. 112 (1988)	7
Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440 (Tex. 1993)	6.

Constitution and Statutes	Page
U.S. CONST., Art. VI, Cl. 2	2,8,9
U.S. CONST., amend. XIV, § 1	3,9
42 U.S.C. § 1983	2,3,5,6,7,8,9
28 U.S.C. § 1257(a)	2

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On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR WRIT OF CERTIORARI

Petitioners Elsa Gomez and Jose Ramiro Gomez, individually and on behalf of Jose Gomez and Sergio Gomez, their minor children, respectfully petition this Court for a writ of certiorari to review the judgment and decision of the Eighth Court of Appeals and Supreme Court of Texas.

OPINIONS BELOW

The judgment and opinion of the Eighth Court of Appeals (App. A, 1-15) is reported, *Gomez v. Housing Authority of the City of El Paso, Texas,* 148 S.W.3d 471 (Tex. App. -- El Paso 2004, pet. denied). The other decisions and orders of the trial court, appellate court, and supreme court are unreported.

JURISDICTION

The Eighth Court of Appeals, El Paso, Texas, entered its judgment and opinion on August 19, 2004 (App. A, 1-15), and denied the motion for rehearing on October 20, 2004 (App. B, 16). The Supreme Court of Texas denied a timely filed petition for review on April 8, 2005 (App. C, 17). The Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C.A. section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injury in an action at law.

42 U.S.C.A. § 1983.

The Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., Article VI, Cl. 2.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

U.S. CONST., amend. XIV, § 1.

STATEMENT OF THE CASE

This case involves the question of whether Texas state courts may, consistent with federal statutes, federal common law, and/or the Supremacy Clause and Due Process Clause of the Fourteenth Amendment, deny subject matter jurisdiction in state court over claims arising under 42 U.S.C. § 1983, by either (1) applying state rather than federal law to determine whether a defendant is immune from liability or suit under 42 U.S.C. § 1983, or (2) transforming a plea to the jurisdiction into a Rule 12(b)(6)-type motion for failure to state a claim -- a procedural device not recognized or allowed under Texas law -- to decide the case on the merits.

A. Facts and Judicial Proceedings.

On or about October 29, 1999, the minor children in this case, Jose Gomez and Sergio Gomez, were residents of the Machuca Housing Project owned and operated by The Housing Authority of the City of El Paso (HACEP), and were sexually molested by a convicted sex offender while on the premises. Plaintiffs filed suit in April 2001 and filed their Second Amended Petition on or about December 2, 2002 alleging, *inter alia,* claims under federal law for violations of civil rights arising under 42 U.S.C. § 1983 and the United States Constitution:

Defendant HOUSING and its employees , acting under the color of law and in the course and scope of their employment with Defendant HOUSING, and Defendant ARMSTRONG, acting under the color of law, deprived Plaintiffs of rights secured by the Constitution and Laws of the State of Texas and the United States of America. Said deprivation of Plaintiffs' rights were a producing cause of Plaintiffs' damages. Specifically, Plaintiffs would show that Defendant HOUSING's supervising personnel, its apartment manager, by action or inaction demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises. Plaintiffs would also show that Defendant ARMSTRONG, as apartment manager, by action or inaction demonstrated deliberate indifference to the occupant children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises.

Additionally, Defendants' inadequate screening procedures in failing to remove occupants known to have a criminal history from the premises, in violation of their rules; failing to exclude from the premises occupants known to have a criminal history; failing to prevent the entry onto the premises of persons known to have a criminal history; and failing to supervise the convicted criminal displayed deliberate indifference to Plaintiffs' safety and constitutional rights. The screening process was inadequate. Defendants' supervising employees were deliberately indifferent in following and enforcing the policy and the inadequate policy directly caused Plaintiffs' injury. Defendants

learned the facts of inappropriate sexual behavior. Defendants demonstrated deliberate indifference toward Plaintiffs' constitutional rights by failing to take action that was obviously needed to prevent or stop the abuse and such failure caused constitutional injury to Plaintiffs. Defendants' actions constitute a violation under the U.S. Constitution, giving rise to a civil rights cause of action under 42 U.S.C § 1983, and Fifth and Fourteenth Amendments of the Constitution of the United States. Defendants are liable to Plaintiffs for the damages hereinafter described, together with attorney's fees. [App. F 30-31.]

On February 20, 2003, The Honorable Kathleen H. Olivares, Presiding Judge for the 205th Judicial District Court, El Paso County, Texas, granted Defendant HACEP's plea to the jurisdiction and dismissed the entire case for lack of subject matter jurisdiction. On appeal, the Eighth Court of Appeals affirmed the trial court's judgment. *Gomez v. Housing Authority of the City of El Paso, Texas,* 148 S.W.3d 471 (Tex. App.–El Paso 2004, pet. denied). Appellants' motion for rehearing to the court of appeals was denied on October 20, 2004. The state supreme court denied appellants' petition for review on April 8, 2005.

B. Establishing this Court's Jurisdiction of the Questions Presented by this Petition.

This Court has jurisdiction over the questions presented by this Petition. First, there are no adequate and independent state grounds for the state court decisions sought to be reviewed here (such as state procedural default grounds), because under Texas procedural practice a plea to the jurisdiction "is a dilatory plea by which a party contests the

trial court's authority to determine the subject matter of the cause of action," and "subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties." *See, e.g., Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993) (citations omitted); *see also Gomez v. Housing Authority of the City of El Paso, Texas,* 148 S.W.3d 471, 476-76 (Tex. App. -- El Paso 2004, pet. denied) (citations omitted).

Petitioners in any event timely raised the federal questions sought to be reviewed in this petition, first, before the trial court at the hearing on Plaintiffs' Motion for New Trial (App. E 20-27); again in Appellants' Brief on appeal to the court of appeals (App. F 28-37); again in Appellants' Motion for Rehearing to the court of appeals (App. G 38-49); and again in the Petition for Review to the state supreme court (App. H 50-65). Finally, the adequacy of a state-law ground to support a judgment precluding litigation of a federal claim in state court is itself a federal question which this Court may review *de novo. Howlett v. Rose,* 496 U.S. 354 (1990). This Court has jurisdiction to hear and decide the questions presented in this Petition should it choose to do so.

REASONS FOR GRANTING THE PETITION

It is not difficult to recognize the plea to the jurisdiction should not have been granted as to the Plaintiffs' pleaded section 1983 claims in this case. Federal law, not state law, should have supplied the rule of decision to decide whether HACEP (and Lupe Armstrong) were immune from Plaintiffs' section 1983 claims, and under federal law HACEP and its employees are "persons"and therefore not immune from liability or suit for section 1983 claims brought against it. *See, e.g., Owen v. City of Independence,* 445 U.S. 622, 647 n.30